

**United States Department of Labor
Employees' Compensation Appeals Board**

L.B., Appellant

and

**U.S. POSTAL SERVICE, HOWELL POST
OFFICE, Howell, MI, Employer**

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**Docket No. 21-0319
Issued: August 9, 2021**

Appearances:

Shelley K. Coe, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On January 2, 2021 appellant, through counsel, filed a timely appeal from a July 6, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 21-0319.

On December 22, 2010 appellant, then a 51-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed tendinitis in her right arm, specifically her shoulder and elbow, as a result of factors of her federal employment. She noted that she first became aware of her condition and its relationship to her federal employment on December 20, 2010. Appellant stopped work on December 21, 2010. On March 23, 2011 OWCP initially accepted the claim for lateral epicondylitis of the right elbow and joint pain in the right shoulder region. On June 29, 2011 appellant underwent OWCP-authorized right shoulder surgery, which included arthroscopic subacromial decompression, distal clavicle excision, and rotator cuff repair. OWCP, on September 19, 2011, expanded the acceptance of appellant's claim to include

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

right rotator cuff tear/sprain. It paid her wage-loss compensation on the supplemental rolls as of May 7, 2011.

Appellant returned to full-duty work on November 11, 2011, but continued to receive wage-loss compensation through December 17, 2011.²

On November 8, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP, in a November 12, 2019 development letter, requested that appellant submit an impairment evaluation from her attending physician addressing whether she had reached maximum medical improvement (MMI) and if so, the extent of any permanent impairment, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It afforded her 30 days to submit the necessary evidence.

In an October 21, 2019 medical report, Dr. Peter E. Metropoulos, Board-certified in occupational medicine, noted appellant's history of injury and medical treatment. He provided results on examination of the right shoulder, including range of motion (ROM) measurements. Dr. Metropoulos also noted the accepted conditions of right elbow lateral epicondylitis, right shoulder joint pain and rotator cuff sprain. He first utilized the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides* to determine the degree of appellant's permanent impairment. Dr. Metropoulos identified the class of diagnosis (CDX) as a class 1 grade C distal clavicle resection according to Table 15-5 on page 403, which yielded a range of upper extremity impairment from 8 percent to 12 percent. He referenced Table 15-7 on page 406, Table 15-8 on page 408, Table 15-9 on pages 410 and 411, and Table 15-34 on page 475. Dr. Metropoulos assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 1, and found that a grade modifier for clinical studies (GMCS) was not applicable because clinical studies were used to determine the impairment class. He applied the net adjustment formula and found a net adjustment of 1, which moved the default grade of C one space to the right, resulting in a grade D, 11 percent permanent impairment of the right shoulder.

Dr. Metropoulos also used the ROM rating methodology to determine impairment to the right shoulder and noted that, under Table 15-34 on page 475, 120 degrees of flexion and 115 degrees of abduction each yielded three percent impairment, 46 degrees of extension, 44 degrees of adduction, and 84 degrees of external rotation each yielded zero percent impairment, and 70 degrees of internal rotation yielded two percent impairment, resulting in a total of eight percent permanent impairment. Utilizing Table 15-35 and Table 15-36 on page 477, and Table 15-7 on page 406, he assigned grade modifiers for ROM, functional history (GMFH), and physical

² OWCP, by decision dated February 29, 2012, finalized a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,907.82 for the period November 11 through December 17, 2011 because she returned to full-time, full-duty work on November 11, 2011, but continued to receive wage-loss compensation for total disability compensation until December 17, 2011. It also found that she was at fault in creation of the overpayment and, thereby, precluded from waiver of recovery of the overpayment. OWCP required recovery of the overpayment in full within 30 days.

³ A.M.A., *Guides* (6th ed. 2009).

examination (GMPE), respectively. With a functional adjustment of five percent for a *QuickDASH* score of 77, Dr. Metropoulos found that the eight percent ROM impairment resulted in a total right upper extremity permanent impairment of 8.4 percent rounded down to eight percent. He explained that as the DBI methodology resulted in a higher rating than the ROM methodology, the DBI calculation of 11 percent upper extremity permanent impairment should be used. Dr. Metropoulos determined that appellant reached MMI in 2012, based on her treatment timeline.

On December 17, 2019 OWCP referred the record to Dr. James W. Butler, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for a review and rating of appellant's permanent impairment of the right upper extremity in accordance with the sixth edition of the A.M.A., *Guides*.

In a March 18, 2020 report, Dr. Butler reviewed a statement of accepted facts (SOAF) and the medical record, including the October 21, 2019 report of Dr. Metropoulos. He noted that the ROM methodology was an acceptable alternative to rate appellant's accepted right upper extremity conditions, but related that he was unable to provide an accurate right upper extremity impairment rating. The DMA explained that Dr. Metropoulos failed to rate appellant's permanent impairment due to her accepted condition of right elbow lateral epicondylitis. He further explained that Dr. Metropoulos failed to provide three documented ROM measurements each for the right shoulder and right elbow. Additionally, the DMA disagreed with Dr. Metropoulos' 11 percent DBI impairment rating for the right shoulder. He reasoned that Dr. Metropoulos improperly excluded a grade modifier for GMCS as his impairment rating was based on a distal clavicle excision, which resulted in a grade modifier for GMCS of 2 for the accepted condition of rotator cuff tear. The DMA related that the above-noted missing information would be helpful in rating appellant's right upper extremity permanent impairment. He advised that she reached MMI on October 21, 2019, the date of Dr. Metropoulos' impairment evaluation.

By letter dated March 30, 2020, OWCP requested that Dr. Metropoulos review Dr. Butler's March 18, 2020 findings and respond to the concerns presented by the DMA within 30 days. No response was received.

In a July 6, 2020 decision, OWCP denied appellant's claim for a schedule award. It found that the opinion of the DMA established that appellant had no permanent impairment of a scheduled member or function of the body, warranting a schedule award.

The Board, having duly considered the matter, finds that this case is not in posture for decision. Pursuant to FECA Bulletin No. 17-06, if OWCP advises the claimant of the evidence necessary to evaluate permanent impairment using the ROM methodology, but does not receive such evidence, it should refer the claimant for a second opinion evaluation to obtain the evidence necessary to complete the rating.⁴ OWCP failed to follow the procedures outlined in FECA Bulletin No. 17-06 by referring appellant for a second opinion after its DMA advised that he was unable to rate her right upper extremity impairment using the ROM methodology without ROM measurements for the right shoulder and right elbow.

⁴ FECA Bulletin No. 17-06 (issued May 8, 2017).

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.⁵ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. While it began to develop the evidence, it failed to complete its obligation to secure a proper evaluation regarding permanent impairment of the right upper extremity based upon the ROM methodology.⁶ Therefore, OWCP failed to resolve the issue in the case.⁷

On remand, OWCP shall refer appellant for a second opinion examination to obtain the evidence necessary to calculate her upper extremity impairments using both ROM and DBI methodologies.⁸ Following this and such other further development as deemed necessary, it shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the July 6, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: August 9, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁵ See *T.C.*, Docket No. 19-0771 (issued March 17, 2021); *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

⁶ *T.C.*, *id.*; *M.A.*, Docket No. 19-1732 (issued September 9, 2020).

⁷ *T.C.*, *id.*; *X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

⁸ See *T.C.*, *id.*; *R.C.*, Docket No. 19-1385 (issued September 8, 2020).